IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 20201

RETAIL CLERKS UNION,
LOCALS 770, 137, 905 and 1222,

Appellants,

AND

RALPH E. KENNEDY, REGIONAL DIRECTOR
OF THE 21ST REGION OF THE
NATIONAL LABOR RELATIONS BOARD, ETC.,

Appellant,

VS.

FOOD EMPLOYERS COUNCIL, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR AMICI CURIAE AMERICAN RESEARCH MERCHANDISING INSTITUTE, U. S. SERVATERIA CORPORATION AND WESCO MERCHANDISING CO.

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I. JURISDICTIONAL STATEMENT

This is an appeal from the District Court's order granting a temporary injunction brought by the Petitioner below, the Regional Director of the Twenty-first Region of the National Labor Relations Board, one of the appellants herein, as well as by various union-appellants [Tr. 201; 221-224]. Amici curiae American Research Merchandising Institute, U. S. Servateria Corporation and Wesco Merchandising Co. were granted permission to appear by order of this Court dated July 2, 1965, as corrected on July 14, 1965.

II. STATEMENT OF THE CASE

These amici, along with amicus curiae Joint Counsel of Teamsters No. 42 (hereinafter referred to as Teamsters), urge, contrary to the contention of Appellants, that the District Court acted properly in granting an injunction order as originally prayed for by the Appellant Regional Director. A complete factual analysis of the evidence and Statement of the Case is set forth in Amicus Curiae Teamsters Brief (pp. 2-14), and these amici adopt and herein incorporate that Statement of the Case.

III. ARGUMENT

A. Preliminary Statement

The crux of Appellants' arguments to this Court s that the District Court is precluded from exercising its iscretion and issuing an injunction notwithstanding the evidence efore the District Court (presented not only by the Charging arties but by the Appellants themselves), the various admissions ade by certain Appellants as to the true reason for seeking rbitration and the legal admission by the Appellant Regional irector that such an arbitration, per se, would be violative f the National Labor Relations Act, and, finally, the Appellant egional Director's verified Petition filed with the Court below lleging that an injunction is necessary to effectuate the purposes nd comply with the dictates of the Act.

While the posture of the record in this case, as matter of fact as well as law, fully justifies the action f the Court below, it is well to point out initially the trange irony created by Appellants' arguments. This Court, n a case involving virtually all the same parties and clearly ealing with the same underlying dispute, Frito Company v. NLRB, 30 F. 2d 458 (1964), pointedly rejected the strained rationale nd limited theory of labor law jurisprudence as Appellants

gain urge in the instant case:

In Frito, the General Counsel initially issued a com-laint which intended to grant full relief to the charging arties. In the instant case, the Regional Director initially ought an injunction which would have fully protected the charg-ng parties herein.

In Frito, the General Counsel subsequently amended is complaint so as to permit the Unions to continue the subject nfair labor practices. Here, the Regional Director, after fil-ng a Petition seeking an injunction, changes his stance, no onger requests an injunction, but urged the Court below to sancti-y a stipulation which, by the Regional Director's own prior ad-ission would permit (indeed, encourage) the Unions to commit un-air labor practices of the same nature.

In Frito, the evidence, as presented by the charg-ng party, justified a broad order that would have permitted meaningful policy decision in accordance with the dictates f the Act and would fully protect innocent parties. In the nstant case, the charging parties presented evidence to the ourt below which justified a meaningful injunction along the ines originally sought by the Regional Director and which ould prevent any further unfair labor practices and enable the harging parties to obtain a full measure of protection.

In the Frito case, the National Labor Relations Board took the position in administrative proceedings and before this Court that though the evidence might justify a broader order than the Board was willing to grant, the Board was precluded from affording the charging parties any further relief because the General Counsel did not seek to grant the charging parties the full measure of protection. Here, though the Regional Director originally admitted that the Appellant Unions' effort to seek arbitration would be a violation of the Act and though the evidence quite clearly shows that the Appellant Unions seek to achieve by compelling arbitration what has been denied to them under the Act[1], the District Court, say Appellants, is precluded from weighing the evidence and exercising its discretion

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[1] Not only has the Regional Director in his Petition alleged that he had "reasonable cause" to believe that certain provisions of Article 1 of the Collective Bargaining Agreement between the Clerks and the Employers violated Section 8(e) of the Act (Tr. 13-14, Par. 5 (j); Tr. 11-12, Par. 4 (j)) but, in addition, subsequently the Trial Examiner for the National Labor Relations Board on July 23, 1965, after a hearing in the matter, Case No. 21-CE-37, held that the same provision of the collective bargaining agreement did, in fact, violate Section 8(e) of the Act.

in the premises because the Regional Director, for some enigmatic reason, now seeks to deny the charging parties a full measure of protection and now seeks to ignore his prior admissions.

In Frito, this Court clearly and specifically held that once the General Counsel has issued a complaint he "has embarked upon the judicial process" and that thereafter evidence having properly been placed before the Board to justify the full measure of protection that could be afforded the charging parties, the Board was "free to consider the evidence and to exercise judicial discretion" so as to permit a broader scope of relief than asked for by the General Counsel. (Twenty-Ninth Annual Report of the National Labor Relations Board, p. 112 (1964)). Here, the Regional Director was required by law to seek an injunction. Once having done so, he is not free to act in derogation of his duty by the "simple" shift of seeking a stipulation in lieu of an injunction when, in point of fact based upon the evidence and his own admissions, anything else but an injunction would fail to afford the relief necessary to effectuate the policies of the Act. Having embarked "upon the judicial process" which in this case is now delegated to the court, as a judicial not a ministerial function, the court not only had the right but the duty to exercise that judicial function.

The District Court's duty, in this context and by statute, is no less a judicial one than the Board's duty in Frito. The Court is directed by Congress to perform a judicial act; to exercise discretion; to grant relief as the evidence dictates. To do less is to negate the mandate of Section 10 (1) of the Act; to do differently is to relegate the District Court to the role of a process server rather than a server of the judicial process.

B. The Court Below had The Jurisdiction, Authority and Duty, in Light of the Evidence and the Petition, to Issue an Injunction Under Section 10 (1) of the Act.

There can be no question that under Section 10 (1) of the Act (61 Stat. 136 (1947), 29 U. S. C. §160 (1)) the Board, once it has "reasonable cause to believe" that certain types of unfair labor practices are being committed, must petition the District Court for appropriate injunctive relief pending a final adjudication of the Board in respect to such mandate; the Regional Director is not granted discretion in these circumstances; he is required to seek an injunction. This clear dictate of the Act has long been recognized by the Board, Congress and the commentators. See Chairman McCullough's Remarks, Joint Industrial Relations Conference of Michigan State University, April 19, 1962, in 49 L.R.R.M. 74, 81 (1962);

Summary of Findings and Conclusions of the Subcommittee on the National Labor Relations Board of the House Committee on Education and Labor, 87th Cong., 1st Ses. (1961); Comment, 111 U. Pa. L. Rev. 460, 465 (1953).

Section 10(l) itself quite clearly states that, upon the filing of a petition before the Regional Director, as in the instant case,

> "the District Court shall have jurisdiction to grant such injunctive relief . . . as it deems just and proper."

The Act, therefore, must be interpreted in the same way as this Court in the Frito case recognized the duties of those involved in the judicial process. There the Court stated (330 F. 2d at 363-64):

> "It is now well settled that the General Counsel's decision to investigate a charge or issue a complaint is unreviewable by the Board. However, once the decision has been made to issue a complaint and to prosecute it, the General Counsel has embarked upon the judicial process which is reserved to the Board."

As applies to the General Counsel, once he has "embarked upon the judicial process", he may not limit or direct the Board in its exercise of the judicial process, the Regional Director in the instant case may not limit the Court's function. There being reasonable cause for the Regional Director to file a Petition for an injunction, the Court is under a statutory dictate to

the part of the Regional Director. The Court is not, in this context at least, an agent of the Regional Director.

Appellants can hardly deny that the Court may exercise judicial discretion in both issuing or not issuing an injunction and in the substantative matter of any injunction. The language of the Act, its legislative history and case law is too clear to deny the Court this authority. And in light of the record and evidence before the District Court, as will be pointed out below, there can be no real contention that the Court did not properly exercise its authority. Appellants, however, seek to detour the issue away from the District Court's authority by arguing that the Court was unduly influenced by the charging parties who by their bete noir interference unduly influenced the Court; and since, admittedly, these charging parties had no standing to sue for an injunction, the Court relying upon their evidence and presentation, in effect, brought about a violation of the Norris-LaGuardia Act.

Such a contention, however, may easily be disposed. The charging parties are not officious intermeddlers. Congress, in the second proviso to Section 10 (l), specifically granted the charging parties the right to be heard before the District Court in a 10 (l) proceeding:

> "Upon the filing of any such petition [for injunctive relief under Section 10 (l)], the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony."

issue an injunction order within the scope of that requested in the Petition of the Regional Director. Here, in accordance with the rights granted them under Section 10 (1) of the Act, the charging parties appeared by counsel, made germane arguments to the Court, and were, indeed, the only ones presenting relevant testimony in regard to the propriety of the injunction. To urge, as Appellants indirectly do, that the charging parties may not by such arguments and such evidence attempt to influence the District Court as to the proper action that should be taken is to offer charging parties a meaningless choice: to remain mute, or to merely echo the Regional Director or to make points and be "heard" but not be listened to. As a matter of law, these Hobson Choices were not intended under Section 10 (1). See Phillips v. U M W, District 19, 218 F. Supp. 103, 106 (E.D. Tenn., 1963), where the court said:

> "The denial of the right to intervene does not however mean that the charging party is wholly without right to be heard or that the Court will ipso facto disregard any and all legal contentions advanced by the charging party in this proceeding."

This is particularly true in the posture of this case where the only voices urging that the statute and the law be followed were the charging parties.

Proper"; There Was Virtually No Evidence To Show That It Was Arbitrary.

In the Regional Director's verfied petition brought under Section 10(1), he noted that a prior 10(1) proceeding had been brought but was dismissed upon the Clerks' stipulation that they would refrain from "maintaining, giving effect to, or enforcing Article I" of the collective bargaining agreement in question insofar as that Article would have the effect of requiring Employers to cease doing business with the charging parties and other persons (Tr. 15, Par. 6, Tr. 45, Par. 2 (a)). The Regional Director's petition further alleged that the Clerks violated this stipulation by demanding arbitration as to whether the Clerks' inability to enforce Article I had the effect of requiring a renegotiation of the entire agreement or, in the alternative, whether the Clerks were free to strike the Employers because of the latter's inability to enforce Article I (Tr. 56-57). The Regional Director alleged and argued that this arbitration demand violated Section 8(e) of the Act. (Tr. 16-17, Par. 9) The Regional Director has never presented any evidence to the contrary. He has never sought to amend his petition and has never represented to the Court that such a demand for arbitration or such an arbitration is not violative of the Act. He has limited his representations to the Court to the assertion that he has been given "assurances" that the arbitration award would not be put into effect unless he first approves it.

waivered from his allegation, supported with ample authority, that an arbitration, of the nature sought by Appellant Unions, would violate the Act. (May 10 Transcript, p. 17, l. 15-18; p. 33, l. 7-18; Tr. 168, l. 20-23; June 14 Transcript p. 50, l. 7-11)[2]

Nor can it be realistically argued that the attempt to enforce arbitration avoids the prohibition of Section 8(e) because it purportedly is limited to grievances claimed as a result of the unenforceability of the illegal clauses of Article I. In effect, this forced arbitration was designed either to void the entire contract or to release the Clerks from their no-strike pledge contained therein. But such an objective, in the context of an 8(e) dispute has been held by this Court to be violative of the Act In NLRB v. Amalgamated Lithographers, 309 F.2d 31 (9th Cir. 1963), the lithographers had a "trade shop" clause which was found to violate Section 8(e), and although the employers were not required to live up to this clause, if they did not do so the

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[2]Among the cases in point cited by the Regional Director in support of the proposition that demanding and engaging an arbitration with respect to clauses that are violative of Section 8(e) is itself violative of Section 8(e) are: Hillbro Newspaper Printing Co., 135 NLRB 1132, enforced, Los Angeles Mailers Union v. NLRB, 311 F.2d 121 (D.C. Cir. 1962) (reaffirming hot cargo clause is "entering into" it), Kennedy v. Service Employees Union, Civil No. 63-490-JWC (S.D. Cal. 1963) (arbitrating is equivalent to giving effect to unlawful clause), McLeod v. American Fed'n of Television Artists, 234 F. Supp. 832 (S.D.N.Y. 1964) (ibid.)

lithographers were free to open the contract. Concluding that under this provision "the employer agrees that he will deal with non-union employers only at the risk of giving up all of his benefits under his contract," 309 F.2d at 36, the Court found this tactic to be unlawful. The Board, too, had dealt with such subterfuges and has uniformly condemned them. See, e.g., Arthur J. Galligan, 148 NLRB No. 31, 56 L.R.R.M. 1471, 1472, 1964 CCH NLRB ¶13,334 at pp. 21, 295-96 (1964) (imposition of financial penalty on employer who purchases coal from non-union company). And in Brown Transport Corp., 140 NLRB 1436 (1963), set aside on other grounds, 334 F.2d 539, 548-49 (D.C. Cir. 1964), the Board said of a "hazardous work clause" which permitted the contract to be reopened for additional benefits if the employees were required to handle "hot cargo":

> "It is a method for making it difficult and expensive, and unlikely for an employer signatory to the agreement to insist that his employees handle 'hot cargo' goods or equipment." 140 NLRB at 1439.

It is gainsay that the Employers who would be dragged into such an arbitration have nothing to gain but risk either their entire contract or suffer strike activity. Their only alternative, assuming such were possible, is to "voluntarily" put into effect the illegal clauses of Article I. Such an "urging" on the part of the Clerks is in itself a form of pressure that is unlawful. Met with the "facts of life" and the evidence supplied by the head of one of the

sought by the Clerks (See Exhibit 2, p. 1, column 1, 2; p. 2, column 3; p. 3, column 2. And see May 10 Transcript, p. 40, l. 1-8; p. 42, l. 20-24), the District Court, in a proper exercise of judicial discretion, would not permit itself to sanction such a ruse or encourage or be an ally to such further violations of the Act.[3]

The Court below recognized the sham for what it is: an attempt to compel compliance on the part of the Employers with the unlawful clauses or to face the unenviable but inevitable alternative of arbitrating the existence of the entire collective bargaining agreement under a strike threat. The Court, for one, recognized that it was enforcing public rights and that through the guise of the stipulation proposed, these public rights were being undercut. It exercised, based upon the record and the evidence before it, proper judicial discretion. Its order, in accordance with the dictates of the Act, was just and proper. The only "evidence" in opposition to the Court's action was the "assurances" given by the Clerks to the Regional Director. This, as a matter of law and fact, was patently insufficient to permit a violation of the Act.

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[3]Arbitration itself under these circumstances constitutes an unfair labor practice and such proceedings have been enjoined at the request of the Board. McCleod v. American Fed'n of Television Artists, 234 F. Supp. 832 (S.D.N.Y. 1964)

The Regional Director should not properly have accepted the "assurances" of the Clerks; the statute dictates the Regional Director seek an injunction. At any rate, however, as the court in Madden v. Milk Wagon Drivers Local 753, I.B.T., 229 F. Supp. 490 (D.C.N. Ill., 1964) stated, district courts are not to be "rubber stamps" in 10(1) proceedings. The Court below is not a "rubber stamp"; it need not have accepted the "assurances" of the Clerks.

For the reasons set forth herein, the District Court properly enjoined the arbitration and its order should be affirmed.

DATED: August 19, 1965

Respectfully submitted,

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COUNTY OF LOS ANGELES) BY MAIL

I hereby certify under penalty of perjury that copies of Brief for Amici Curiae American Research Merchandising Institute, U. S. Servateria Corporation and Wesco Merchandising Co., in the matter of Retail Clerks Union, Locals 770, 137, 905 and 1222, Appellants, and Ralph E. Kennedy, Regional Director of the National Labor Relations Board, etc., Appellant, vs. Food Employers Council, Inc., Appellee, have been sent first-class mail, postage prepaid, this 19th day of August, 1965, to:

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